No. 04-438

Supreme Court, U.S.
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Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617; ARTHUR CELESTINO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL NUMBER 214,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. RESPONDENT'S ARGUMENT THAT SECTION § 7122(a)(2) HAS NO IMPACT ON § 7122(a)(1) LACKS MERIT

Respondent misstates petitioner's position. Respondent claims that petitioners do not challenge the use of *de novo* review in cases arising under § 7122(a)(1). Resp. 10. Respondent, like the Fifth Circuit, thus misses the crux of petitioner's argument. While *de novo* review under § 7122 (a)(1) is not directly at issue (since *de novo* review may certainly occur under § 7122(a)(1) without trammeling *Steelworkers*), whether with *de novo* review or otherwise, § 7122

(a)(1) does not grant authority to the FLRA to do anything it wants, including the authority to overturn an arbitrator's interpretation of a collective bargaining agreement.

Respondent acknowledges that the extremely limited arbitral review allowed under the *Steelworkers* Trilogy[1] has been consistently applied by previous courts, including the District of Columbia Circuit in *United States Dep't of the Treasury v. FLRA*, 43 F.3d 682, 687 (D.C. Cir. 1994), to FLRA decisions arising out of Section 7122(a)(2) of the Federal Labor Management Relations Act (the FLMRA). Resp. 9-10. Despite this concession, Respondent seeks to avoid the Fifth Circuit's split from the D.C. Circuit, and the Fifth Circuit's repudiation of this Court's holdings in the *Steelworkers* trilogy and *United Paperworkers v. Misco, Inc.*, 484 U.S.29 (1987), by arguing that § 7122(a)(2) and *Steelworkers* have, "no relevance to this case," because the FLRA conducted its review under Section 7122(a)(1), not Section 7122(a)(2). Resp. 10.

Respondent states (Resp 10):

> Because any question concerning the applicability of the *Steelworkers* trilogy to cases arising under § 7122(a)(2) is not properly presented here, further review on that question is unwarranted.

Respondent's argument in inappropriate because the Fifth Circuit has literally ruled, with respect to both Sections 7122 (a)(1) and (2):

> The *Steelworker* Trilogy opinions, however, deal with federal court review of employment arbitration decisions, not federal court review of FLRA decisions. The

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[1] *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Steelworker Trilogy opinions **do not provide guidance on this court's jurisdiction over FLRA decisions.**

Pet. App 9a. (emphasis added). This ruling represents a split with the District of Columbia Circuit.

Moreover, even if the Fifth Circuit had limited its pronouncement to cases supposedly arising just under § 7122 (a)(1), Respondent misses a key point. This case squarely presents the unresolved and important question—the question of whether the *Steelworkers* Trilogy applies to cases arising under § 7122(a)(1). After all, Respondent concedes that the *Steelworkers* trilogy applies to cases arising under § 7122 (a)(2). In other words, this Court should say, yes or no, whether under § 7122(a)(1) analysis by the FLRA, the arbitrator's interpretation of a collective bargaining agreement is sacrosanct, as it (everyone except the Fifth Circuit agrees) must be under § 7122(a)(2) analysis.

Respondent employs a circular argument. The majority of the FLRA engaged in classic review of the merits to "find" that there was no conflict between the MLA and the agency regulation. The starting point was for the FLRA itself to review and construe the MLA, which it freely did (over the dissent of Member Pope). The arbitrator had found that the MLA, given its wording and the bargaining history, conflicted with the agency regulation. The MLA contains an agreement that the level at which exposure to potentially hazardous levels of airborne asbestos was "practically eliminated," per the arbitrator's interpretation of the MLA, would be determined by arbitrators, on a case by case basis. The arbitrator based his interpretation of the MLA on its language and the bargaining history. The case-by-case determination is, per the arbitrator, in conflict with the Air Force regulation which set a single threshold for all cases. The FLRA majority rejected the arbitrator's finding that the MLA deals with the issue and is in conflict with the agency regulation. Per the FLRA majority, the MLA is silent on the standard (case-by-

case determination and silence are different), so there was no conflict with the agency regulation and its across the board standard.

The Fifth Circuit approved this merits review interpretation of the MLA by the FLRA under § 7122(a)(1) and added its own findings as to what the MLA means. The Fifth Circuit, just as one arbitrator might say of another arbitrator's decision, found that bargaining history was no evidence of the meaning of the MLA. App. 7a-8a.

Respondent's circular argument is this: The FLRA **can** interpret the MLA to see if the MLA is in conflict with a law. If so, the FLRA, under § 7122(a)(1) can freely overturn the award based on its interpretation of the MLA, despite the fact that under § 7122(a)(2) the FLRA **cannot** second guess the arbitrator's interpretation of the MLA. Under § 7122(a)(2), the FLRA (just like a district court reviewing an arbitrator's decision in the private sector) is bound by *Steelworkers* and must adhere to the interpretation of the MLA by the arbitrator. A non-circular approach would give effect and meaning to both Sections. Section 7122(a)(1) has ample meaning where the FLRA addresses errors of law, taking the MLA as interpreted by the arbitrator.

Respondent ignores the Fifth Circuit's holding below that the *Steelworkers* doctrine, in connection with § 7122(a)(2), provides "no guidance" in deciding whether or not *Leedom*[2] jurisdiction exists for federal courts to review FLRA decisions in federal collective bargaining under the FLMRA. Pet. App. 9a. The Fifth Circuit's holding creates a split in the circuits and breaks from the District of Columbia Circuit's holding in *United States Dep't of the Treasury v. FLRA* which holds that in questions of contract interpretation, as is the case here, the FLRA is limited under § 7122(a)(2) to the standard

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[2] *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180 (1958)

of arbitral review found in the *Steelworkers* Trilogy. *United States Dep't of the Treasury v. FLRA* at 687.

Respondent, and the Fifth Circuit, urge a reading of the FLMRA under which Section 7122(a)(2) is rendered meaningless by Section 7122(a)(1). Under the Fifth Circuit's and Respondent's logic, the FLRA is entirely free of the strict limitations of the *Steelworkers* Trilogy by merely stating, as both it and the Fifth Circuit have done here, that its decision which reinterprets the meaning of the parties' collective bargaining agreement is actually made pursuant to § 7122(a)(1) instead of § 7122(a)(2). Under the Fifth Circuit's holding, the FLRA is free to overturn arbitral decisions based upon collective bargaining agreements as long as the FLRA (even over the dissent of one of its members) states that it is *not* overturning the arbitrator's interpretation of the collective bargaining agreement. Worse yet, within the Fifth Circuit, no federal court has jurisdiction under the *Leedom* doctrine to review the FLRA's actions because the Fifth Circuit holds that the *Steelworkers* Trilogy provides no guidance in interpreting §7122(a)(2). App. 9a.

In practice, the Fifth Circuit holding grants all federal agencies that disagree with an arbitrator's interpretation of a bargaining agreement the vehicle to avoid *Steelworkers* and to have arbitration decisions overturned by the FLRA who sits as super arbitrator, simply by claiming that their exception to the award is pursuant to § 7122(a)(1), not § 7122(a)(2). Under the Fifth Circuit's holding, in the federal sector, the FLRA has power to do what this Court has emphatically stated no federal court can do in the private sector, reexamine the merits of the arbitrator's decision based upon the collective bargaining agreement.

The Fifth Circuit and the FLRA urge a reading of the FLMRA in which §7122(a)(1) trumps § 7122(a)(2). Under standard guidelines of statutory interpretation, one clause of a statute cannot be read to the exclusion of another and the

statute must be viewed as a whole. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986). A federal district court must have *Leedom* jurisdiction to prevent the FLRA from reaching into the exclusive province of the arbitrator. Otherwise there is no remedy for petitioners and the FLRA has effectively stripped petitioners of a right which has been granted by Congress under the FLMRA. The FLRA's circular argument creates a Catch-22 where the FLRA can do whatever it wants, and no court has jurisdiction to stop it, as long as it claims it is acting under § 7122(a)(1).

II. RESPONDENT'S ARGUMENT THAT THIS PETITION IS CASE SPECIFIC IS UNFOUNDED

Respondent also argues, without explanation, that to overturn the errors of this case would necessarily be case specific and does not merit this Court's review. This argument flies in the face of the historical precedent set by *United Paperworkers v. Misco* and *Leedom v. Kyne*. In *Misco*, as here, neither the district court nor the Fifth Circuit took the appropriate action and this Court remedied the overturn of an arbitration award to preserve the *Steelworkers* Trilogy. In *Leedom*, this Court dealt with specific facts to correct an agency that overstepped its statutory guidelines.

Furthermore, Respondent ignores the risk that the Fifth Circuit's opinion below has the certain effect of *permitting* the FLRA to liberally overturn arbitration awards in the federal sector. Although the decision is unpublished, one of the parties (who thus received a copy of the decision) is the FLRA itself. The FLRA is the one and only entity that reviews federal sector arbitration awards. When the only entity that matters (the FLRA itself) has notice of the Fifth Circuit decision, the fact that it is unpublished does not reduce its effect at all. While § 7122(a)(2), written by Congress, says one thing, this decision says another. This decision says *Steelworkers* has no application in the federal sector

(so long as the FLRA engages in second guessing the arbitrator in the name of § 7122(a)(1) review for errors of law).

This Court should resolve the question of whether federal sector arbitration is radically different from private sector arbitration. The Fifth Circuit's holding is at odds not only with the *Steelworkers* Trilogy, the holdings of the District of Columbia Court of Appeals, and earlier more reasoned decisions of the FLRA itself. This decision undercuts federal policy favoring arbitration, a policy furthered by this Court's rulings in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). If arbitration is to be a workable and fair substitute for litigation (or for concerted activity by unions) arbitration awards must be protected by the doctrine this Court announced in 1960 in the *Steelworkers Trilogy* and federal jurisdiction must be granted under the *Leedom v. Kyne* doctrine if the FLRA subverts the *Steelworkers* Trilogy within the federal sector.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully prays that the Court grant petition for a writ of certiorari.

Respectfully submitted,

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